UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

RONALD C. WILSON	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	Case No. 96B00045
HARRISBURG SCHOOL DISTRICT,	)	
Respondent.	)	

DECISION AND ORDER
(March 10, 1997)

MARVIN H. MORSE, Administrative Law Judge

Appearances: **John B. Kotmair, Jr., on Behalf of Complainant**
Archie L. Palmore, Esq., Solicitor, Harrisburg School District, on Behalf of Respondent

I. Procedural History

In January 1991 Complainant Ronald C. Wilson (Complainant or Wilson) applied for the position of school bus driver with the Harrisburg (Pennsylvania) School District (Harrisburg or Respondent). Harrisburg hired Wilson.

On or about October 16, 1991, Wilson presented his employer with a self-styled "Statement of Citizenship,"[1] purporting to exempt Wilson from income tax withholding.

According to Wilson, Harrisburg acquiesced for three years to his demand not to withhold taxes from his wages. On May 14, 1994, however, Harrisburg initiated tax withholding deductions. Wilson then confronted the employer with a second gratuitous document, an improvised "Affidavit of

[1]The improvised "Statement of Citizenship," which Wilson offered to show that he was not subject to income tax withholding and social security deductions, is ***not*** to be confused with official INS Forms N-560 or N-561, which are INS certificates of U.S. citizenship, documents suitable for verifying employment eligibility under 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b)(1)(v)(A)(2) (1997).

Constructive Notice" proclaiming that Wilson had renounced his social security number.[2] Wilson claimed that he was not liable for social security contributions or tax withholding because he had repudiated his social security number.

Apparently because Harrisburg would no longer accede to his demand, on a date unspecified Wilson filed a complaint of discrimination based on national origin with the Equal Employment Opportunity Commission (EEOC). The thrust of Wilson's complaint was that Harrisburg discriminated against him by disregarding his "Statement of Citizenship," presented on or about October 16, 1991, and his "Affidavit of Constructive Notice," presented on or about May 14, 1994. Wilson alleged that Harrisburg discriminated against him by treating him, a United States citizen, as a "non-resident alien." Wilson argued that a United States citizen, unlike a nonresident alien, is entitled "to the full fruit of his labor"-- i.e., a paycheck from which neither taxes nor social security contributions are deducted. Wilson accused Harrisburg of discriminating by compelling such contributions as a condition of employment, "[o]r he could choose not to work for them." The EEOC dismissed his complaint.

After the EEOC dismissed his complaint, through his representative, John B. Kotmair, Jr. (Kotmair), by letter dated February 28, 1996, Wilson filed a charge with the U.S. Department of Justice, Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC). The OSC Charge was filed approximately two years after Harrisburg first withheld social security contributions and taxes from Wilson's wages. The OSC Charge alleged that Wilson had been discriminated against on the basis of national origin because, although he was a citizen, Harrisburg treated him like an alien by deducting social security contributions and withholding income taxes from his paycheck.

By an undated determination letter, OSC informed Kotmair that "there is insufficient evidence of reasonable cause to believe that these charges state a cause of action under 8 U.S.C. § 1324b" and that Wilson's charge was untimely filed -- i.e., not within 180 days of the alleged act of discrimination. Accordingly, OSC declined to file a complaint on Wilson's behalf and advised that he had the right to file a complaint directly with the Office of the Chief Administrative Hearing Officer (OCAHO) within 90 days after receipt.

On May 14, 1996, Kotmair filed a Complaint with OCAHO on Wilson's behalf. The Complaint alleged that although Harrisburg hired Wilson in 1991 and continued to employ him, Harrisburg discriminated against Wilson on the basis of national origin and citizenship status by refusing to accept his improvised proffered documents. The Complaint characterized as discriminatory Harrisburg's rejection of Wilson's gratuitously tendered "Statement of Citizenship to assert his right not to be treated as an alien for any reason or purpose in all matters regarding his employment and

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[2] In the case of an individual wage earner, the social security number also serves as the taxpayer identification number, pursuant to 26 C.F.R. § 301.6109-1(a)(1)(ii)(D), (b)(2), (d).

employability." Complaint at ¶ 16(a). The Complaint denied, however, that Harrisburg "asked for too many or wrong documents than required to show that I am authorized to work in the United States." Complaint at ¶ 17. Wilson requested back pay from October 16, 1991. Complaint at ¶ 21.

On June 12, 1996, OCAHO issued a Notice of Hearing (NOH), which informed Harrisburg that it had the right to file an Answer to the Complaint within 30 days of receipt of the Complaint.

No Answer having been received, on August 14, 1996, I issued an Order to Show Cause providing Harrisburg an opportunity to explain its failure to answer the Complaint.

On September 6, 1996, Harrisburg responded to the August 14, 1996 Order, explaining that the Complaint was served on an employee not authorized to accept service and that because the employee was on extended sick leave, no one knew the whereabouts of Wilson's Complaint. Harrisburg advised in effect that it would respond to the Complaint through its insurance carrier within 30 days.

On September 12, 1996, Kotmair filed a Notice of Appearance, perfecting a previously deficient authorization to represent Wilson, and also filed a Motion for Default Judgment, with Brief and Legal Authorities in Support. The Motion requested back pay from May 14, 1994, (the date as of which Harrisburg appears to have begun to deduct Wilson's payroll taxes) in the amount of "30%" (presumably representing income tax and social security deductions withheld).

On October 1, 1996, I denied the Motion for Default and ordered Harrisburg to file an Answer by October 7, 1996. No Answer or other pleading has been filed by Harrisburg.

The question whether default judgment may be entered where the forum lacks subject matter jurisdiction is one of first impression in OCAHO jurisprudence. This Order determines that a default judgment is not warranted where the forum is without jurisdiction, and dismisses the Complaint for lack of subject matter jurisdiction. I also find that the charge was untimely and fails to state a claim upon which relief can be granted under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), enacting Section 274B of the Immigration and Nationality Act, codified as 8 U.S.C. § 1324b, pursuant to which this case is before me as the administrative law judge (ALJ) to whom it was assigned by the CAHO.

II. Discussion and Findings

A forum is without power to render default judgment where it has no subject matter jurisdiction over a complaint. Williams v. Life Sav. & Loan, 802 F.2d 1200, 1202 (10th Cir. 1986); Doughan v. Tutor Time Child Care Systems, Inc., 1996 WL 502288, at 1 (E.D.Pa. 1996).

An incumbent employee's complaint regarding terms and conditions of employment fails to state a claim upon which relief can be granted under 8 U.S.C. § 1324b. Horne v. Hampstead, 6

OCAHO 906, at 4 (1997).[3] This is so because ALJ's power under § 1324b(a)(1) is limited to discriminatory failure to hire and discharge, and does not include terms and conditions of employment. A complaint of citizenship status discrimination which fails to allege either discriminatory refusal to hire or discriminatory discharge is insufficient as a matter of law. Failure to allege either refusal to hire or wrongful discharge compels a finding of lack of § 1324b(a)(1) subject matter jurisdiction.

To the same effect, an incumbent employee who alleges that his employer refused to accept gratuitously tendered, improvised documents purporting to prove that the employee is exempt from federal tax withholding and social security wage deductions fails also to state a legally cognizable cause of action under IRCA. "[N]othing in the employment eligibility verification system requires an employer uncritically to accept . . . [an] employer's unilateral representations of exemption from federal taxes, whether income taxes or social security taxes . . . ." Lee v. Airtouch Communications, 6 OCAHO 888, at 5 (1996), 1996 WL 675579, at *4 (O.C.A.H.O.). There can be no 8 U.S.C. § 1324b(a)(6) cause of action where the employer does not request documents as part of the employment eligibility verification process, and where the employee tenders documents that are not statutorily prescribed for employment eligibility verification purposes. Boyd v. Sherling, 6 OCAHO 916, at 18-21 (1997); Winkler v. Timlin, 6 OCAHO 912, at 11-12 (1997); Horne v. Hampstead, 6 OCAHO 906, at 4; Toussaint v. Tekwood Associates, Inc., 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at *13 (O.C.A.H.O.); Lee v. Airtouch Communications, 6 OCAHO 901, at 13 (1996), 1996 WL 780148, at *10 (O.C.A.H.O.); Westendorf v. Brown & Root, Inc., 3 OCAHO 477, at 11 (1992), 1992 WL 535635, at *6 (O.C.A.H.O.).

A. Wilson's Claim Is Untimely

Filed at best two years after the alleged discriminatory event, Wilson's Complaint is substantially out of time. IRCA requires that a charge be filed within 180 days of the allegedly discriminatory event. 8 U.S.C. § 1324b(d)(3); 28 C.F.R. § 68.4 ("An individual must file a charge with the Special Counsel within one hundred and eighty (180) days of the date of the alleged unfair immigration-related employment practice"). The OSC Charge states that Wilson "on or about October 16, 1991" presented to Harrisburg a "Statement of Citizenship" which was subsequently disregarded on a date unspecified. The OCAHO Complaint requests back pay from October 16, 1991, the date on which Harrisburg presumably began to "discriminate" against Wilson. The motion for default, however, requests a sum equivalent to 30% of wages purportedly withheld after "May 14, 1994," presumably adopting that as the date of a discriminatory event. As OSC noted in its determination

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[3] Citations to OCAHO precedents in bound Volume I, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, seriatim, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.

letter, "the charge was not filed within 180 days of the alleged discrimination." Whether the act of alleged discrimination took place on October 16, 1991, or on May 14, 1994, Wilson is out of time. A complaint not timely filed must be dismissed. Riddle v. Dept. of Navy, 1994 WL 547840, at 1 (E.D.Pa. 1994).

B. Where a Forum Lacks Subject Matter Jurisdiction, Default Judgment Will Not Stand

Although the forum's decision whether to enter a default judgment is within its sound discretion,

> when entry of a default judgment is sought against a party who has failed to plead or otherwise defend, the court . . . has an affirmative duty to look into its jurisdiction over the subject matter . . . .

Williams v. Life Sav. & Loan, 802 F.2d at 1202. When a forum lacks subject matter jurisdiction, a default judgment must be vacated and the case dismissed. Doughan v. Tutor Time Child Care Systems, Inc., 1996 WL 502288, at 1.

Because I lack subject matter jurisdiction, I reaffirm my decision not to grant default judgment and I dismiss Wilson's Complaint.

C. Where a Forum Lacks Subject Matter Jurisdiction, the Forum May *Sua Sponte* Dismiss the Complaint

The Supreme Court has instructed that federal ALJs are "functionally comparable" to Article III judges. Butz v. Economou, 438 U.S. 478, 513 (1978). To the extent that reviewing courts characterize the Article III trial bench as a court of limited jurisdiction, the ALJ is *a fortiori* a judge of limited jurisdiction, subject to identical jurisdictional strictures. Boyd v. Sherling, 6 OCAHO 916, at 6; Winkler v. Timlin, 6 OCAHO 912, at 4; Horne v. Town of Hampstead, 6 OCAHO 906, at 5.

"Subject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative obligation to ensure that they are acting within the scope of their jurisdictional power." 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (2d ed. Supp. 1995).

The party asserting subject matter jurisdiction bears the burden of proving it. Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977).

Fed. R. Civ. P. 12(h)(3) compels dismissal of claims over which a court lacks subject matter jurisdiction:

> Whenever it appears by the suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Fed. R. Civ. P. 12(h)(3); Mansfield, C. & L. M. Ry. Co. v. Swan, 111 U.S. 379 (1884); McLaughlin v. Arco Polymers, Inc., 721 F.2d 426 (3rd Cir. 1983); Doughan, 1996 WL 502288, at *1; Erie City Retirees Ass'n v. City of Erie, 838 F. Supp. 1048, 1050-51 (W.D. Pa. 1993).

A forum's first duty is to determine subject matter jurisdiction because "lower federal courts are courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940). In so doing, the forum is not free to expand or constrict jurisdiction conferred by statute. Willy v. Coastal Corp., 503 U.S. 131, 135 (1992). To determine subject matter jurisdiction, the forum must "construe and apply the statute under which . . . asked to act." Chicot, 308 U.S. at 376.

Furthermore, federal forae "are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" Hagans v. Lavine, 415 U.S. 528, 536 (1974) (quoting Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904)). A claim is "plainly unsubstantial" where "obviously without merit" or where "its unsoundness so clearly results from . . . previous decisions . . . as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." Hagans, 415 U.S. at 535 (internal quotations omitted) (citing Ex parte Poresky, 290 U.S. 30, 31-31 (1933)). Where, from the face of the complaint, there is no reasonably conceivable basis on which relief can be granted, the forum is obliged to confront the failure of subject matter jurisdiction. In such cases, the forum should dismiss the complaint. Erie City Retirees Ass'n, 838 F. Supp. at 1049. Where it is "patently obvious" that, on the facts alleged in the complaint, the complainant cannot prevail, a forum may do so *sua sponte*. Riddle v. Dept. of Navy, 1994 WL 547840, at *1.

D. The Immigration Reform and Control Act of 1986 (IRCA) Does Not Confer Subject Matter Jurisdiction Over Terms and Conditions of Employment

1. IRCA Governs Only Immigration-Related Causes of Action

The relevant statutes this forum must construe are 8 U.S.C. § 1324b, which prohibits unfair immigration-related employment practices based on national origin or citizenship status, and § 1324a(b) (Section 101 of IRCA), which obliges an employer to verify an employee's eligibility to work in the United States at the time of hire.

Section 102 of IRCA enacted a new antidiscrimination cause of action, amending the Immigration and Nationality Act (INA) by adding Section 274B, codified as 8 U.S.C. § 1324b. Section 102 was enacted as part of comprehensive immigration reform legislation to accompany Section 101, which, codified as 8 U.S.C. § 1324a, forbids an employer from hiring, recruiting, or referring for a fee, any alien unauthorized to work in the United States. Section 1324b was intended to overcome the concern that, as a result of employer sanctions compliance obligations introduced by § 1324a, people who looked different or spoke differently might be subjected to consequential workplace discrimination.[4]

President Ronald Reagan's formal signing statement observed that "[t]he major purpose of Section 274B is to reduce the possibility that employer sanctions will result in increased national origin and alienage discrimination and to provide a remedy if employer sanctions enforcement does have this result."[5]

Section 101 of IRCA, 8 U.S.C. § 1324a, makes it unlawful to hire an individual without complying with certain employment eligibility verification requirements. 8 U.S.C. §§ 1324a(b). As implemented by the Immigration and Naturalization Service (INS), the employer must check the documentation of all employees hired after November 6, 1986, and complete an INS Form I-9 within a specified period of the date of hire. The employee must produce documentation establishing both identity and employment authorization.

The employment verification system established under § 1324a provides a comprehensive scheme which stipulates categories of documents acceptable to establish identity and work authorization. 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b)(1)(v). When an employer hires an individual, the latter must sign an INS Form I-9 certifying his or her eligibility to work and that the documents presented to the employer to demonstrate the individual's identity and work eligibility are genuine. The employer signs the same form, indicating which documents were examined, and attests that they appear to be genuine and appear to relate to the individual who was hired. List A documents can be used to establish both work authorization and identity. List B documents establish only identity and List C documents establish only employment eligibility. Employees who opt to use List B and List

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[4]See "Joint Explanatory Statement of the Committee of Conference," Conference Report, IRCA, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess., at 87 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5840, 5842.

[5]Statement by President Reagan upon signing S. 1200, 22 Weekly Comp. Pres. Docs. 1534, 1536 (Nov. 10, 1986). See Williamson v. Autorama, 1 OCAHO 174, at 1173 (1990), 1990 WL 515872 (O.C.A.H.O.) ("Although a Presidential signing statement falls outside the ambit of traditional legislative history, it is instructive as to the Administration's understanding of a new enactment"). Accord, Kamal-Griffin v. Cahill Gordon & Reindel, 3 OCAHO 568, at 14 n.11 (1993), 1993 WL 557798 (O.C.A.H.O.).

C documents to complete the I-9 process must submit one of each type of document. Only those documents listed may be used.

The employee completing the I-9 process is free to choose which among the prescribed documents to submit to establish identity and work authorization. Upon verifying the documents, the employer must accept any documents presented by the employee which reasonably appear on their face to be genuine and to relate to the person presenting them. The Immigration Act of 1990 amended the INA to clarify that the employer's refusal to accept certain documents or demand that the employee submit particular documents in order to complete the Form I-9 violates IRCA's antidiscrimination provisions. See Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. 104-208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. § 1324b(a)(6).

2. Section 1324b Proscribes Only Discriminatory Hiring and Firing and Document Abuse

Title 8 U.S.C. § 1324b relief is limited to "hiring, firing, recruitment or referral for a fee, retaliation and document abuse." Tal v. M.L. Energia, Inc., 4 OCAHO 705, at 14 (1994), 1994 WL 752347, at *11 (O.C.A.H.O.).

As understood by the EEOC (Notice No.-915.011, Responsibilities of the Department of Justice and the EEOC for Immigration-Related Discrimination (Sept. 4, 1987)):

> [c]onsistent with its purpose of prohibiting discrimination resulting from sanctions, [§ 1324b] only covers the practices of hiring, discharging or recruitment or referral for a fee. It does not cover discrimination in wages, promotions, employee benefits or other terms or conditions of employment as does Title VII.

Wilson has been Harrisburg's employee since 1991. Wilson sues six years after hire. Wilson seeks IRCA redress not because Harrisburg refused to hire him or because Harrisburg fired him, but because Harrisburg withholds federal taxes and deducts social security contributions from his paycheck, thereby refusing to accept improvised, unofficial documents purporting to exempt Wilson from taxation. Wilson contests Harrisburg's mandatory statutory duty to withhold taxes, and denies his own obligation to pay taxes. Wilson even requests that his employer be assessed a monetary penalty equivalent to the tax withheld, in effect asking this forum, which has no jurisdiction over tax matters, to provide a tax refund! Wilson's request is without legal authority. Wilson's claim turns on a misguided contention that only non-citizens are subject to tax withholding.

Wilson sues because his longtime employer refused to treat him preferentially by excusing him from his tax and social security obligations. To refuse to prefer is not to discriminate. Where an

employer treats all alike, he discriminates against no one. Nowhere in his pleading does Wilson describe any discriminatory treatment on any basis whatsoever. Wilson does not allege that other employees of different citizenship or nationality were treated differently, nor does he implicate the INS Form I-9 employment eligibility verification system. Among the terms and conditions of employment that an employer may legitimately and nondiscriminatorily impose is the requirement that the employee submit, as must the employer, to Internal Revenue Code (IRC) mandates. The Harrisburg School District's decision to subject Wilson to its tax and social security regimen is not discrimination under IRCA.

The administrative enforcement and adjudication modalities authorized to execute and adjudicate the national immigration policy IRCA evinces are not sufficiently broad to address Wilson's attacks on the tax and the social security systems. Where § 1324b has been held to be available to address citizenship or national origin status discrimination without implicating the I-9 process, the aggrieved individual was found to have been treated differently from others, and, unlike Wilson, consequently discriminatorily denied employment. United States v. Mesa Airlines, 1 OCAHO 74, at 466-467 (1989), 1989 WL 433896, at *26, 30-31 (O.C.A.H.O.).

3. IRCA Does Not Reach Terms or Conditions of Employment

Section 1324b does not reach terms and conditions of employment. Naginsky v. Depart. of Defense, et al., 6 OCAHO 891, at 29 (1996), 1996 WL 670177, at *22 (O.C.A.H.O.) (citing Westendorf v. Brown & Root, Inc., 3 OCAHO 477, at 11; Ipina v. Michigan Dept. of Labor, 2 OCAHO 386 (1991); Huang v. Queens Motel, 2 OCAHO 364, at 13 (1991)). Nothing in IRCA relieves an employer of obligations conferred by the Internal Revenue Code (IRC) to withhold taxes and social security deductions from employees' wages. Boyd v. Sherling, 6 OCAHO 916, at 2, 8-16; Winkler v. Timlin, 6 OCAHO 912, at 8-12. Nothing in IRCA's text or legislative history prohibits an employer from complying with the IRC regimen or from asking for a social security number (the individual tax identification number). Winkler v. Timlin, 6 OCAHO 912, at 11-12; Toussaint v. Tekwood Associates, 6 OCAHO 892, at 16-17, 1996 WL 670179, at *14; Lewis v. McDonald's Corp., 2 OCAHO 383, at 5 (1991), 1991 WL 531895, at *3-4 (O.C.A.H.O.). Nothing in IRCA confers upon an employer the right to resist the IRC by accepting gratuitously tendered improvised documents purporting to relieve an employee from taxation. IRCA simply does not reach tax and social security issues or exempt employees from compliance with duties conferred elsewhere by statute. It follows that an employer who requires an employee to submit to lawful and non-discriminatory terms and conditions of employment does not violate IRCA. The gravamen of Wilson's Complaint, a challenge to the IRC, is a matter altogether outside the scope of ALJ jurisdiction.

E. The Internal Revenue Code (IRC) Compels Withholding Taxes and Deducting Social Security Contributions from an Employee's Wages, Despite the Employee's Renunciation of His Social Security Number

An employee cannot avoid tax liability by renouncing and revoking his social security number. See United States v. Updegrave, 1995 WL 606608, at *2 (E.D.Pa. 1995).

The IRC ***compels*** an employer "at the source" to withhold taxes and to deduct social security taxes from an employee's paycheck through IRS Form W-4. 26 U.S.C. § 3402(a)(1); 26 C.F.R. § § 31.3401(a)-1, 31.3402(b)-1, 31.3402(f)(5)-1(a). An employer who fails to collect the withholding tax is "liable for the payment of the tax required to be deducted and withheld." 26 U.S.C. § 3403; 26 C.F.R. § 31.3403-1.

IRS Form W-4 obliges an employee to disclose his social security number, which serves as the individual taxpayer identification number. 26 C.F.R. § 301.6109-1(a)(1)(ii). A wage-earner entitled to a "social security number [must use it] for all tax purposes . . . even though . . . a nonresident alien." 26 C.F.R. § 301.6109-1(d)(4). An employee who provides a statement related to IRS Form W-4 for which there is no reasonable basis "which results in a lesser amount of income tax actually deducted and withheld than is properly allowable" is subject to a civil money penalty of $500. 26 C.F.R. § 31.6682-1 (False Information with Respect to Withholding).

IRCA does not restrict an employer's freedom to insist on compliance with applicable tax law as a condition of employment. Boyd v. Sherling, 6 OCAHO 916, at 12-15; Winkler v. Timlin, 6 OCAHO 912, at 8-10. An employer may also insist that the employee provide his individual taxpayer identification number because "[n]othing in the logic, text, or legislative history of the Immigration Reform and Control Act limits an employer's ability to require a social security number as a precondition of employment." Lewis v. McDonald's Corp., 2 OCAHO 383, at 4, 1991 WL 531895, at *3-4. See also Winkler v. Timlin, 6 OCAHO 912, at 11-12; Toussaint v. Tekwood Associates, 6 OCAHO 892, at 16-17, 1996 WL 670179, at *14.

To challenge the validity of a withholding tax, employees, whether citizens or resident aliens, must follow stringent statutory procedures precedent. Before suing for a tax withheld, the employee must pay the tax, apply for a refund, and, if denied, sue in ***federal district court***. Cheek v. United States, 498 U.S. 192, 206 (1991). Such procedures precedent do not violate the employee's right to due process. Cohn v. United States, 399 F.Supp. 168, 169 (E.D.N.Y., 1975). "[T]he right of the United States to exact payment and to relegate the taxpayer to a suit for recovery is paramount." Id.

Title 26 U.S.C. §§ 7421(a), 7422(a), and 7422(b) apply to ***everyone***:

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in ***any court*** by ***any person*** . . . until a claim for refund or credit has been duly filed with the Secretary. . . .

* * *

> PROTEST OR DURESS. -- Such suit or proceeding may be maintained whether or not such tax . . . has been paid under protest or duress.

26 U.S.C. §§ 7421(a), 7422(a)(b) (emphasis added).

Non-resident aliens, like U.S. citizens and resident aliens, have long been subject to withholding tax. Commissioner of Internal Revenue v. Wodehouse, 337 U.S. 369, 380, 388 n.11, 391 n.13 (1949); Korfund Co., Inc. v. C.I.R., 1 T.C. 1180 (1943). The IRC mandates that tax be withheld even from non-resident alien and foreign corporate income to the extent income is derived from U.S. sources. 26 U.S.C. § 1441(a); C.J.S. Internal Revenue §§ 1149, 1151.

Wilson defines Harrisburg's refusal to accord him special tax-exempt status as discriminatory. Disparate treatment is the essence of discrimination. Nowhere in his Complaint does Wilson indicate that Harrisburg treated any other employee differently from Wilson. Harrisburg's insistence that Wilson be treated as are all citizen and resident taxpayers does not constitute discrimination. To define discrimination as the refusal to prefer, as Wilson seeks, turns discrimination law on its head.

F. IRCA Does Not Confer Subject Matter Jurisdiction over Challenges to the Internal Revenue Code (IRC) and Social Security Act

1. This Forum Is Enjoined from Hearing Challenges to the IRC by Its Own Legislative Mandate and by the Anti-Injunction Act

Wilson seeks to avail himself of this forum of limited jurisdiction in lieu of federal district court, the appropriate forum. This forum, reserved for those "adversely affected directly by an unfair ***immigration-related*** employment practice," is powerless to hear tax causes of action, whether or not clothed in immigration guise. 28 C.F.R. § 44.300(a) (1996); Boyd v. Sherling, 6 OCAHO 916, at 8.

"[T]he general rule is that . . . federal courts will not entertain actions to enjoin the collection of taxes." Mathes v. United States, 901 F.2d 1031, 1033 (11th Cir. 1990). ***The Supreme Court construes "collection of taxes" to embrace employer withholding of taxes.*** United States v. American Friends Serv. Comm., 419 U.S. 7, 10 (1974); see also Bright v. Bechtel Petroleum, Inc., 780 F.2d 766, 769 (9th Cir. 1986); Weatherly v. Mallinckrodt Medical, Inc., 1995 WL 695107, at *3 (E.D.Pa. 1995); Barnes v. United States, 1990 WL 42385, at *4 (W.D.Pa. 1990). "[A] suit to enjoin the . . . collection of taxes can only proceed when 'it is apparent that, under the most liberal view of the law and facts, the United States cannot establish its claim,'" if the court in which relief is sought already exercises equitable jurisdiction over the claim. Bordo v. United States, 1996 WL 472413, at *1

(E.D.Pa. 1996) (quoting Enochs v. Williams Pkg. & Nav. Co., 370 U.S. 1, 5 (1962)); Sutherland v. Egger, 605 F. Supp. 28, 30 (W.D.Pa. 1984).

Where a taxpayer has fulfilled statutory conditions precedent to a suit, i.e. -- paid the tax, applied for a refund, and been denied, "***[d]istrict court shall have original jurisdiction*** . . . of any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed." 28 U.S.C. § 1346(a)(i) (emphasis added).

Except in these extraordinary circumstances, "[n]o court is permitted to interfere with the federal government's ability to collect taxes." Intern. Lotto Fund v. Virginia State Lottery Dept., 20 F.3d 589, 591 (4th Cir. 1994). Courts are barred from so doing by 26 U.S.C. § 7421(a), a statute popularly known as "The Anti-Injunction Act." ***The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."*** 26 U.S.C. § 7421(a) (emphasis added).

The purpose of the Anti-Injunction Act is to protect "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of judicial interference." Bob Jones Univ. v. Simon, 416 U.S. 725, 736 (1974). The Anti-Injunction Act embodies "Congress' long-standing policy against premature interference with the determination, assessment, and collection of taxes." Jericho Painting & Special Coating, Inc. v. Richardson, 838 F. Supp. 626, 629 (D.D.C. 1993).

The Anti-Injunction Act enjoins suit to restrain activities culminating in tax collection. Linn v. Chivatero, 714 F.2d 1278, 1282, 1286-87 (5th Cir. 1983); Hill v. Mosby, 896 F. Supp. 1004, 1005 (D.Idaho 1995). ***"Collection of tax" under the Anti-Injunction Act includes tax withholding by employers***. United States v. American Friends Serv. Comm., 419 U.S. at 10. ***Suits to enjoin the collection of the withholding tax are therefore "contrary to the express language of the Anti-Injunction Act."*** Jericho Painting & Special Coating, Inc. v. Richardson, 838 F. Supp. at 629 (emphasis supplied).

The Anti-Injunction Act mandates anticipatory withholding of taxes from all potential taxpayers, foreign and domestic, and is not limited to actions initiated after IRS assessments. Intern. Lotto Fund v. Virginia State Lottery Dept., 20 F.3d at 592. Even where the taxpayer is a foreign entity, possibly protected by an international treaty, and the collection of the tax may be legally dubious, the Anti-Injunction Act protects the collecting agent from suit. Yamaha Motor Corp., USA v. United States, 779 F. Supp. 610, 612 (D.D.C. 1993).

Where a taxpayer has not followed statutory conditions precedent to suit, courts are deprived of jurisdiction.

> Section 7421(a) of the Internal Revenue Code prohibits suits brought to restrain the assessment or collection of taxes . . . The . . .

> contention that [a Complainant] . . . is entitled to a court determination of his tax liability prior to any collection action has been rejected by several courts. See e.g. Kotmair, Jr. v. Gray, 74-2 USTC P 9492 (Md. 1974), aff'd per curiam [74-2 USTC P 9843], 505 F.2d 744 (4th Cir. 1974). The plaintiff has an adequate remedy at law pursuant to the tax refund procedure set forth in Section 7422 of the Internal Revenue Code . . . . In order to contest the merits of a tax . . . a taxpayer may file an administrative claim for a refund after payment of the tax. Internal Revenue Code, § 7422. The administrative claim must be filed and denied prior to filing . . . [an] action in the federal district court. Black v. United States [76 1 USTC P 9383], 534 F.2d 524 (2d Cir. 1976). [Where] the plaintiff failed to meet this jurisdictional prerequisite . . . the [c]ourt is without jurisdiction.

Melechinsky v. Secretary of Air Force, and Director, Internal Revenue Service, 1983 WL 1609, at *2 (D. Conn. 1983). See also Tien v. Goldberg, 1996 WL 751371, at *2 (2d Cir. 1996); Humphreys v. United States, 62 F.3d 667, 672 (5th Cir. 1995).

2. This Forum of Limited Jurisdiction Is Not Empowered to Hear Challenges to the Social Security Act

Challenges to the Social Security Act and the statutory requisites for its implementation do not properly implicate ALJ jurisdiction under 8 U.S.C. § 1324b.

The constitutionality of the Social Security Act has long been judicially acknowledged. Helvering v. Davis, 301 U.S. 619, 644 (1937); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937). The Supreme Court has held social security's withholding system uniformly applicable, even where an individual chooses not to receive its benefits:

> The tax system imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.

United States v. Lee, 455 U.S. 252, 261 (1982) (statutory exemption for self-employed members of religious groups who oppose social security tax available only to the self-employed individual and unavailable to employers or employees, even where religious beliefs are implicated).

> We note here that the statute compels contributions to the system by way of taxes; it does not compel anyone to accept benefits.

Lee, 455 U.S. at 261 n.12.

The Court has found "mandatory participation . . . indispensable to the fiscal vitality of the social security system." Lee, 455 U.S. at 258.

> "[W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program." S.Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 116 (1965), U.S. Code Cong. & Admin. News (1965), pp. 1943, 2056. Moreover, a comprehensive national security program providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer.

Id.

Wilson argues that one may opt out of social security. The Supreme Court has held otherwise. Although an employee may decline benefits, an employee must submit to deductions. Lee, 455 U.S. at 258, 261 n.12. In any event, social security challenges do not implicate immigration-related unfair employment practices and are therefore beyond this forum's limited reach.

G. This Forum Lacks Subject Matter Jurisdiction over Wilson's National Origin Claim

This forum's adjudication of Wilson's national origin discrimination claim is barred because the forum has no jurisdiction over employers of more than fourteen employees, such as the Harrisburg School District; because the claim has already been adjudicated by EEOC, the proper forum; and because it is legally insufficient.

I take official judicial notice of the fact that the Harrisburg School District is an employer of well over fifteen employees.[6] This forum's adjudication of Wilson's Complaint is therefore precluded, because it is well established that ALJs exercise jurisdiction over national origin discrimination claims only where employers employ more than three (3) and fewer than fifteen (15) employees. 8 U.S.C. § 1324b(a)(2)(B); Huang v. United States Postal Service, 2 OCAHO 313, at 4 (1991), 1991 WL 531583, at *2 (O.C.A.H.O.), aff'd, Huang v. Executive Office for Immigration Review, 962 F.2d 1 (2d Cir. 1992) (unpublished); Akinwande v. Erol's, 1 OCAHO 144, at 1025 (1990), 1990 WL 512148, at *2 (O.C.A.H.O.); Bethishou v. Ohmite Mfg., 1 OCAHO 77, at 537 (1989), 1989 WL

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[6] According to the U.S. Dept. of Commerce 1990 Census, the city of Harrisburg public schools serve over 8,000 students, necessitating a commensurate workforce. 1990 Census of Population: Pennsylvania, Social and Economic Characteristics (Dept. Comm. 1993).

433828, at *3 (O.C.A.H.O.); Romo v. Todd Corp., 1 OCAHO 25, at 124 n. 6 (1988), 1988 WL 409425, at *20 n.6 (O.C.A.H.O.), aff'd, United States v. Todd Corp., 900 F.2d 164 (9th Cir. 1990). This forum has no jurisdiction over Wilson's claim of national origin discrimination because the Harrisburg School District employs more than fourteen employees.

Wilson's pleadings confirm that he filed an EEOC claim which was dismissed, arising out of the same facts as in the present case. Although he provides no details, I understand that EEOC has concluded that "charges alleging national origin or citizenship discrimination against employers because of their withholding of Federal income taxes or social security taxes from the wages of U.S. citizens . . . should be dismissed for failure to state a claim" under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000-e *et seq*. Memorandum, Ellen J. Vargyas, EEOC Legal Counsel to All EEOC District, Area & Local Directors, July 13, 1995, "Clarification to April 13, 1995 Memorandum on Charges Alleging National Origin Discrimination Due to the Withholding of Federal Income or Social Security Taxes from Wages," at 1. Because dismissal for failure to state a claim is a merits disposition insofar as the parties are covered by Title VII, even though the underlying charge may fail to state a cognizable claim, Wilson's national origin claim is vulnerable also to the prohibition against overlap between § 1324b and Title VII. 8 U.S.C. § 1324b(b)(2). See Winkler v. Timlin, 6 OCAHO 912, at 5-6.

Even had I jurisdiction over Wilson's claim of national origin discrimination, however, the Complaint fails substantively to state a claim upon which relief can be granted. A complaint of national origin discrimination which fails to specify Complainant's national origin is insufficient as a matter of law. Boyd v. Sherling, 6 OCAHO 916, at 23; Toussaint v. Tekwood, 6 OCAHO 892, at 15, 19 WL 670179, at *11. Remarkably, Wilson does not even identify his national origin. Instead, he repeatedly refers to his national origin as that of a U.S. citizen. Discrimination against United States citizens is addressed separately. 8 U.S.C. § 1324b(a)(1)(B). Wilson's argument that he was discriminated against on the basis of national origin, is based on Harrisburg's refusal to accept his improvised "Statement of Citizenship." This allegation, however, relates only to claims of document abuse and citizenship status discrimination. Because by its own terms the national origin discrimination claim is based solely on Complainant's citizenship status, it is dismissed on the additional ground of failure to state a claim upon which relief can be granted.

H. Wilson's Citizenship Cause of Action Fails to State a Claim Upon Which Relief Can Be Granted

Refusal to hire or discharge are the only citizenship status discrimination claims cognizable under § 1324b. The entries, *seriatim*, on Wilson's OCAHO complaint format, as well as the tenor of pleadings, indicate an ongoing employment relationship, as confirmed by the motion for default which requests "back pay from May 14, 1994, to present . . . in the portion of 30% of his total pay" presumably taken for the purposes of income tax and social security withholding. The pleadings consistently point to Wilson as having been an employee of Harrisburg since 1991.

OCAHO jurisprudence makes clear that ALJs have § 1324b citizenship status jurisdiction only where the employee has been discriminatorily rejected or not hired. Title 8 U.S.C. § 1324b does not reach conditions of employment. Here, although Wilson remains employed, claiming neither refusal to hire nor wrongful termination, he seeks recourse over his dispute concerning federal tax withholding and social security law compliance. See discussion at II.D.2 and 3, supra, pages 8-9.

This proceeding stems from what can at best be characterized as misapprehension that ALJ jurisdiction is available to resolve an employee's philosophic or political disagreement with obligations imposed by federal revenue law. Such philosophical and political dispute is beyond the scope of § 1324b. Complainant is in the wrong forum for the relief he seeks. A congressional enactment to provide a remedy which addresses a particular concern does not become a per se vehicle to address all claims of putative wrongdoing. This forum is one of limited jurisdiction, powerless to grant the relief sought by Complainant. I am unaware of any theory on which to posit § 1324b jurisdiction that turns on an employer's tax withholding obligations. Wilson's gripe is with the internal revenue and social security prerequisites to employment in this country, not with immigration law. The Complaint must be dismissed for lack of subject matter jurisdiction.

I. Wilson's Document Abuse Cause of Action Fails To State a Claim Upon Which Relief Can Be Granted

Jurisdiction over document abuse can only be established by proving that the employer requested specific documents "for purposes of satisfying the requirements of section 1324a(b)," a comprehensive system whereby an employer verifies an employee's eligibility to work in the United States by means of prescribed documents. 8 U.S.C. § 1324b(a)(6). The pleadings in this case fail to disclose that Harrisburg asked Wilson to produce any documents whatsoever. Accordingly, there is no basis on which to posit § 1324b document abuse.

Wilson's Complaint has nothing to do with the employment eligibility verification system established pursuant to 8 U.S.C. § 1324a. For example, Wilson explicitly denies that he tendered his "Statement of Citizenship" for the purpose of employment eligibility verification implicated by the § 1324a(b) requirement. Complaint at ¶ 17. In fact, Wilson disclaims that Harrisburg asked for wrong or different documents than those required to show work authorization, denying in effect that he was the victim of document abuse in violation of § 1324b(a)(6). Complaint at ¶ 17. Indeed, Wilson first presented a document ***unrelated*** to employment eligibility verification on May 14, 1994, years after the period in which the employer was required to verify his eligibility for employment. The document Wilson insists should have been accepted by the employer for tax exemption purposes -- the "Statement of Citizenship to assert his right not to be treated as an alien for any reason or purpose in all matters regarding his employment and employability" -- has no place in the § 1324a(b) process.

The holding in Lee v. Airtouch Communications, 6 OCAHO 901, at 13 (1996), 1996 WL 780148, at *10 is particularly apt:

> [t]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in § 1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [Complainant] asserts that [Respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes, the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine. Cf. Toussaint v. Tekwood Associates, Inc., 6 OCAHO 892 at 18-21 (1996) and cases cited therein.

Because nothing in the Complaint implicates obligations of an employer under § 1324a(b), I lack subject matter jurisdiction over Wilson's § 1324b(a)(6) allegations.

III. Conclusion

Where no set of facts can be adduced to support a complainant's claim for relief, and where the complaint affords a sufficient basis for the forum's action, the forum may dismiss the complaint *sua sponte.* Bryson v. Brand Insulations, Inc., 621 F.2d 556, 559 (3rd Cir. 1990).

The decision to grant or deny leave to amend is within the forum's sound discretion. Coventry v. U.S. Steel Corp., 856 F.2d 514, 518 (3rd Cir. 1988) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). The amendment of complaints is generally favored. See Roman v. Jeffes, 904 F.2d 192, 196 n.8 (3rd. Cir. 1990); Weaver v. Wilcox, 650 F.2d 22, 27-28 (3rd. Cir. 1981); Rotolo v. Borough of Charleroi, 532 F.2d 920, 923 (3rd. Cir. 1976); Kauffman v. Moss, 420 F.2d 1270, 1275-76 (3rd. Cir. 1970), cert. denied, 400 U.S. 846 (1970). As the Third Circuit instructs, the forum's reasons for denying leave to amend should be enumerated. Coventry v. U.S. Steel Corp., 856 F.2d at 518. I dismiss Wilson's complaint without leave to amend because his tax challenge, though clothed in immigration-related labor law verbiage, cannot by any conceivable amendment be transformed into a *bona fide* immigration-related unfair employment practice; whatever currency it may have in other circles, as to this forum it is disingenuous and frivolous. Tax challenges, however disguised, are beyond this forum's jurisdictional reach. By its very nature, the Complaint cannot credibly be amended to an immigration-related cause of action.

Taking all Wilson's factual allegations as true, and construing them in a light most favorable to Wilson, I determine that Wilson is entitled to no relief under any reasonable reading of his pleadings. Colburn v. Upper Darby Township, 838 F.2d 663, 666 (3rd. Cir. 1988), cert. denied, Upper Darby Township v. Colburn, 489 U.S. 1065 (1989); Rumfola v. Murovich, 812 F. Supp. 569, 572 (W.D.Pa. 1992). Even if, as Wilson claims, sometime between 1991 and 1994 he gratuitously tendered to Harrisburg documents purporting to exempt him from federal income tax withholding and social security deductions, and even if Harrisburg refused to honor these documents and insisted on making payroll tax

and social security deductions, Harrisburg's conduct constitutes no cognizable legal wrong within the scope of 8 U.S.C. § 1324b. The factual background Wilson describes simply does not support the immigration-related causes of action he pleads. Wilson's legal theory, applied to an employer's lawful and non-discriminatory tax collection regimen, is indisputably outside of IRCA.

Furthermore, the ALJ is precluded from hearing this suit not only by the limits of § 1324b powers, but by the IRC, which immunizes employers from suit when they withhold tax and social security contributions from wages, and by the Anti-Injunction Act, which prohibits courts from hearing such a claim where the taxpayer has not followed statutory conditions precedent. It follows that no default will be entered against Harrisburg notwithstanding that either through negligence, indifference or disdain it has failed to honor the process of this forum and to assist in resolution of the employee's claim.

(a) Disposition

Wilson's Complaint, having no arguable basis in fact or law, is before the wrong forum. The Complaint is dismissed because it is untimely, because this forum lacks subject matter jurisdiction over it, and because it fails to state a claim upon which relief can be granted under IRCA. 8 U.S.C. § 1324b(g)(3).

(b) Appellate Jurisdiction

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within 60 days to a United States Court of Appeals in accordance with 8 U.S.C. § 1324b(i)(1).

SO ORDERED.

Dated and entered this 10th day of March, 1997.

_____

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Decision and Order were mailed postage prepaid this 10th day of March 1997, addressed as follows:

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